May 25, 2017

EX PARTE VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order,*** **CG Docket No. 02-278.**

Dear Ms. Dortch:

On May 23, 2017, the undersigned, Winning Strategies Washington; Vincent Frakes of WellCare Health Plans, Inc; Samuel Marchio of Anthem, Inc; and Mark W. Brennan and Arpan Sura of Hogan Lovells US LLP, counsel to the American Association of Healthcare Administrative Management, met with the following members of the Federal Communications Commission's ("FCC") Consumer and Governmental Affairs Bureau ("Bureau"): G. Patrick Webre, Acting Bureau Chief; Mark Stone, Deputy Bureau Chief; Micah Caldwell, Legal Advisor; Kurt Schroeder, Chief, Policy Division; Kristi Thornton, Associate Division Chief, Policy Division; and Christina Clearwater, Attorney Advisor.

During the meeting, we urged the Bureau to grant the pending Joint Petition expeditiously.[1] The Joint Petition seeks two clarifications regarding healthcare-related communications under the Telephone Consumer Protection Act ("TCPA") and the FCC's *2015 Omnibus TCPA Order*[2]:

1. That the provision of a phone number to a "covered entity" or "business associate" (as those terms are defined under Health Insurance Portability and Accountability Act of 1996 ("HIPAA")) constitutes prior express consent for non-telemarketing calls allowed under HIPAA for the purposes of treatment, payment, or health care operations.

[1] Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order, CG Docket No. 02-278 (filed July 28, 2016) ("Joint Petition").
[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) ("*2015 Omnibus TCPA Order*").

2. That the prior express consent clarification in paragraph 141 and the non-telemarketing health care message exemption granted in paragraph 147, both in the *2015 Omnibus TCPA Order*, be clarified to include HIPAA "covered entities" and "business associates." Specifically, each use of the term "healthcare provider" in paragraphs 141 and 147 of the 2015 Declaratory Order should be clarified to encompass "HIPAA covered entities and business associates."

We explained that patients expect non-marketing communications from other covered entities and business associates to same extent as from healthcare providers – a fact underscored by the low opt-out rate for such calls.[3] We also described the myriad ways in which communications for treatment, payment, and health care operations are beneficial to patients and necessary to the effective functioning of the healthcare ecosystem.

"Operations" calls help reduce costs, improve quality, and serve important public policy goals. According to the Department of Health and Human Services, "health care operations" include "certain administrative, financial, legal, and quality improvement activities of a covered entity that are necessary to run its business and to support the core functions of treatment and payment," such as "[u]nderwriting and other activities relating to the creation, renewal, or replacement of a contract of health insurance or health benefits, and ceding, securing, or placing a contract for reinsurance of risk relating to health care claims."[4] As the Commission acknowledged in its 2012 order, HIPAA permits "operations" calls such as those "notifying a family that a student reaching the age of majority on a parental policy will lose coverage and then offering continuation coverage."[5] Other examples include:

- **Annual Notice of Change**: These periodic communications inform members how plans have changed so that members can ensure that they maintain their existing level of coverage or avoid receiving unwanted services or products.

- **Changes in Network**: Health plan providers may notify members when physicians have been added, removed, or changed from a plan's network.

- **Prescription Delivery:** Notifications that medicine has been shipped or delayed are particularly important, especially where there is a risk that the prescriptions will spoil.

- **Prior Authorization:** For high cost or special services, members may receive a notification regarding prior approval of the service or product, so that the patient is not denied at the doctor's office or following treatment.

[3] Joint Petition at n.36.
[4] HHS, *Uses and Disclosures for Treatment, Payment, and Health Care Operations* http://bit.ly/2kakNkg (last visited May 25, 2017).
[5] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1831 ¶ 187 (2012).

"Operations" calls also help meet key federal policy priorities. For example, CMS has developed and oversees a number of patient healthcare experience surveys that are administered by HIPAA-regulated covered entities and business associates.[6] One prominent example is the Consumer Assessment of Healthcare Providers and Systems ("CAHPS") surveys, which are designed to assess patient experience and care quality in a particular healthcare setting.[7] CAHPS surveys solicit input on access to healthcare services, healthcare providers' communication skills, care coordination, and customer service.[8] Such surveys play an integral role in CMS' efforts to improve healthcare in the United States.[9] For hospital surveys ("HCAHPS") conducted by phone,[10] CMS provides a telephone script that hospitals and qualified vendors who place calls to perform the survey must "read verbatim."[11] These calls remain subject to robust opt-out protections: CMS does not allow the survey to be administered to patients who elect not to participate while hospitalized or who subsequently ask a hospital or approved vendor not to contact them.[12]

In addition to CAHPS surveys, many covered entities engage in other surveying of the patient experience to further their continuing efforts to improve quality of care, patient outcomes, and patient safety.

"Payment" calls, meanwhile, help ensure that patients continue to receive the health insurance benefits for which they signed up. Health insurance providers may, for example, place outreach calls specifically targeted to alert members that a purchase at an out-of-network pharmacy would be reimbursed. Providers may also send automated alerts to remind members that their questions regarding coverage for a particular benefit have been answered and direct them to a secured portal to review the decision. As another example, "coordination of benefit" calls to periodically confirm supplemental coverage help ensure that co-payments are accurately calculated at the point-of-sale (typically at the physician's office). And, of course, payment reminders and follow-up notifications remain a critical, low-cost safeguard to avoid unintended lapses in health insurance coverage or the provision of care.

The uncertainty created by the *2015 Omnibus TCPA Order* has chilled these calls and other communications that provide myriad benefits to patients, such as treatment adherence reminders, coverage and benefits notifications, and appointment confirmations. There is copious empirical evidence in the record that these non-marketing communications improve health outcomes and expand access to coverage. By granting the Joint Petition, the Bureau can give all

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[6] *See* CMS, *Consumer Assessment of Healthcare Providers & Systems (CAHPS)*, http://go.cms.gov/2qgJf9Y (last visited May 25, 2017) ("*CMS CAHPS Overview*").
[7] *See* AHRQ, *CAHPS: Surveys and Tools to Advance Patient-Centered Care*, http://bit.ly/2ekNN5i (last visited May 25, 2017).
[8] *See* AHRQ, *CAHPS: Assessing Health Care Quality From the Patient's Perspective* 2, http://bit.ly/2rEw3eG (last visited May 25, 2017).
[9] *See CMS CAHPS Overview.*
[10] *See* CMS, *Hospital Inpatient Quality Reporting Program*, http://go.cms.gov/1sYfO3E (last visited May 25, 2017).
[11] *See* CMS, *HCAHPS Telephone Script (English)*, http://bit.ly/2rVp1zK (last visited May 25, 2017).
[12] *See* CMS, *CAHPS Hospital Survey (HCAHPS) Quality Assurance Guidelines* 55-56 (Mar. 2016), *available at* http://bit.ly/2s0puQp.

HIPAA-regulated entities the legal certainty necessary to give patients the information that they need and expect.

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We urge the FCC to act expeditiously on the Joint Petition, especially given the overwhelming support for the Petition in the docket. It is a critical public policy goal to provide effective and efficient medical care, especially to at-risk populations. Uncertainty surrounding autodialed or prerecorded calls particularly affects wireless-only households, which, in turn, disproportionately harms low-income patients. The Center for Disease Control's most recent data shows that 64.3 percent of adults living in poverty live in wireless-only households compared to 45.7 percent of higher income adults.[13] Granting the Joint Petition would help lift that unnecessary and unintended harm.

In accordance with Section 1.1206(b)(2) of the Commission's rules, this letter is being filed electronically with your office. Please contact the undersigned with any questions in connection with this filing.

Respectfully submitted,

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Principal
Winning Strategies Washington

cc: G. Patrick Webre
Mark Stone
Micah Caldwell
Kurt Schroeder
Kristi Thornton
Christina Clearwater

[13] Center for Disease Control, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2015* (May 2016), http://bit.ly/27e0RzD.